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MEMORANDUM OF LAW

DATE: November 18, 1997
TO: The Public Safety and Neighborhood Services Committee
FROM: City Attorney
SUBJECT: Regulating Tobacco Advertising in the City of San Diego

QUESTIONS PRESENTED

1. What are the current and proposed federal and state laws regulating tobacco advertising? What penalties exist for violation of those laws?
2. What have other cities done to limit tobacco advertising around schools?
3. What can the City of San Diego do to create a "no tolerance zone" for tobacco advertising near schools?

SHORT ANSWERS

1. A chart describing current and proposed federal and state laws regulating tobacco advertising and access to tobacco products is attached at Appendix A.
2. Appendix A also includes various city ordinances and their provisions. According to other city attorneys, from other cities in California, the most successful ordinances are those that were negotiated between the city, merchants, and billboard advertisers, and passed with the consent of all concerned.
3. The City of San Diego could pass an ordinance similar to those passed in other cities prohibiting tobacco advertising within 500 or 1,000 feet of schools. The City should first,

however, establish a need for such an ordinance in order to protect it from later attacks. Currently, billboard advertisers in San Diego observe a self-imposed ban and do not advertise tobacco products on billboards within 500 feet of schools. This office is not aware of any study that has been conducted showing whether tobacco ads are visible from school campuses in San Diego.

BACKGROUND

On July 2, 1997, the Public Safety & Neighborhood Services Committee considered the End Tobacco Advertising and Sales to Kids (E-TASK) Ordinance proposed by Councilmember Juan Vargas. The E-TASK Ordinance proposes regulations on advertising, access to minors, licensing, and specialty tobacco stores, and proposes an enforcement scheme. At the July 2 meeting, Councilmember Byron Wear proposed that this office, along with the City Manager and the Intergovernmental Relations Department, develop a matrix of the current and proposed federal and state laws regulating the placement of tobacco advertisements, including the penalties involved. In addition, we were directed to examine the City of Baltimore's ordinance, which was upheld by the Fourth Circuit Court of Appeals, and determine whether the City of San Diego could enact an ordinance creating a "no tolerance zone" for tobacco advertising around schools.

During the research process, this office met with representatives of the San Diego Merchants Association, the California Grocers Association, the American Lung Association, Eller Media Company, the California Beverage and Restaurant Association, and received written information from Outdoor Systems Advertising. We also attended a conference on September 29, 1997, "What Can Be Done Locally to Regulate Tobacco Advertising," sponsored by the California Department of Health Services, the Stanford Center for Research in Disease Prevention, and the Bay Area City Attorneys Association. The speakers at that conference included researchers, city attorneys from Santa Barbara, Long Beach and San Francisco, and the Baltimore City Attorney.

I. EXISTING AND PROPOSED LAWS REGULATING TOBACCO ADVERTISING

A. Federal Law

1. The Federal Cigarette Labeling and Advertising Act

The Federal Cigarette Labeling and Advertising Act (FCLAA), 15 U.S.C. §§ 1331-1340, is the first hurdle to enacting any local ordinance. The FCLAA “establish[es] a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health.” 15 U.S.C. § 1331. The Act has two stated objectives: first, to inform the public of the dangers of cigarette smoking, and second, to protect commerce by imposing nationally uniform cigarette labeling and advertising regulations. As part of the second prong, the Act requires the familiar warning labels on cigarette packaging and forbids advertising on electronic media. A violation of the FCLAA is a criminal offense and carries a maximum fine of \$10,000. 15 U.S.C. § 1338.

The most important aspect of this law for any local legislative body is its preemption language. Section 5 of the Act, 15 U.S.C. § 1334, bars state and local governments from regulating cigarette advertising and promotion based on “smoking and health.” Based on this language, any state or local law that seeks to regulate advertising in order to limit consumption and thereby improve health, is preempted by the Act, and may be struck down. This preemption does not, however, extend to regulation of cigarette sales, or to regulation of advertising and promotion, *aimed at a purpose other than smoking and health*. Cippolone v. Liggett Group, Inc., 505 U.S. 504 (1992); Mangini v. R.J.Reynolds Tobacco Co., 7 Cal. 4th 1057 (1994).¹

For example, in Mangini, the plaintiff sued a tobacco company alleging that it had used an unfair business practice of targeting minors through the Joe Camel advertising campaign for the purpose of increasing their illegal purchase of cigarettes. The California Supreme Court held that this claim seeking to prohibit advertising to minors, was not preempted by the FCLAA because it was not based on “smoking and health,” but on the prohibition of sales to minors. 7 Cal. 4th at 1069.

On the other hand, the court determined that an ordinance was related to smoking and health in Vango Media, Inc. v. City of New York, 34 F.3d 68 (2d Cir. 1994). In that case, the Second Circuit Court of Appeals struck down a New York City ordinance that required a minimum of one public health message pertaining to the health dangers of smoking, for every four tobacco advertisements displayed on certain property and facilities licensed by the City. The City

¹The State of California reportedly spent \$10 million litigating the Mangini case. The tobacco industry spends \$800 million for advertising and \$1.5 billion on promotional activities in California each year. (Presentation by John Pierce, Ph.D., “Why Regulate Tobacco Advertising?”, September 29, 1997.)

maintained that the purpose of the ordinance was to discourage teenage smoking and did not conflict with federal law. The court of appeals, however, determined that the true purpose of the ordinance was directed toward smoking and health and was, therefore, preempted by the FCLAA. 34 F.3d at 75.

Despite the constraints imposed by the FCLAA, some local governments have been successful in enacting and defending legislation regulating the advertising of tobacco in their districts. Often, the express purpose stated for the legislation is to discourage minors from engaging in criminal activities, that is, the purchase or possession of cigarettes. Penn Advertising of Baltimore, Inc. v. Mayor and City Council of City of Baltimore, 63 F.3d 1318 (4th Cir. 1995), *affirmed on remand by* 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997), is the lead case in this area.

In Penn Advertising, a Baltimore ordinance prohibiting outdoor advertisements was found not to be preempted by federal law. The Baltimore ordinance prohibits all outdoor advertising in “publicly visible locations.” “Publicly visible locations” are defined to include outdoor billboards, sides of buildings and freestanding signboards. The ordinance excepts signs on buses, taxicabs, and commercial vehicles used to transport cigarettes, signs at businesses licensed to sell cigarettes, signs at the stadium, signs along interstate highways, and signs in commercial districts. The Fourth Circuit Court of Appeals held that the ordinance was not preempted by the FCLAA because the ordinance only limited the *location* of signs and not their *content*.

The court also evaluated the ordinance for conflict with the First Amendment of the United States Constitution as an impermissible regulation of commercial speech. In evaluating the First Amendment issue, the court applied the test established in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980). The first step under Central Hudson is to determine whether the regulated advertising is constitutionally protected. 447 U.S. at 563-64. Advertising that is deceptive or concerns unlawful activity is not protected by the First Amendment. For example, tobacco advertisements that include false statements or promote smoking by minors are not protected and may be regulated without constitutional protections. Id.

If an advertisement is constitutionally protected, then the ordinance must meet the requirements of the Central Hudson test: (1) there is a substantial governmental interest in support of the regulation, (2) the ordinance directly advances that governmental interest, and (3) the ordinance is not more extensive than is necessary to further the governmental interest. In Penn Advertising, the court held that the Baltimore ordinance met this test. The court found that the intent of reducing cigarette consumption by minors was a substantial public interest and that the ordinance directly advanced that interest. Furthermore, the court found that the ordinance

was narrowly tailored to its purpose in that it did not ban all advertising but only that most likely to be visible to minors. The court noted that the ordinance did not prohibit legal advertising to adults. 63 F.3d at 1325.

In contrast, the Minnesota District Court in Chiglo v. City of Preston, Minnesota, 909 F. Supp. 675 (D. Minn. 1995), held a City ordinance prohibiting “point of sale” advertising products and permitting display of small signs was preempted by the FCLAA. The Preston ordinance restricted advertising in stores to small, black and white signs with no brand names or logos. The court found that, unlike the ordinance in Penn Advertising, the ordinance before the court applied to the *content* of the advertising and not just the *location*. Although the ordinance stated that its goal was to reduce sales to minors, the court found that this was not its true goal, and the ordinance was actually designed to address health concerns. In its findings, the court stated, “merely having one permissible goal cannot remedy a statute that has at its basis a goal of reducing the health effects of smoking.” Id. at 678 (*citing Vango*). Therefore, the court held that the ordinance was preempted by the FCLAA.

2. The Comprehensive Smokeless Tobacco Health Education Act

The Comprehensive Smokeless Tobacco Health Education Act, 15 U.S.C. §§ 4401-4408 (the “Smokeless Tobacco Act”), regulates the advertising and promotion of smokeless tobacco. Like the FCLAA, the Smokeless Tobacco Act requires warning labels and has preemption language. However, the preemption language in the Smokeless Tobacco Act is specifically limited to health warnings required on packaging or advertisements but not including outdoor billboard advertisements. 15 U.S.C. § 4406(b). Thus, state and local governments have much more latitude under this Act (subject to First Amendment restrictions) to regulate the promotion and advertising of smokeless tobacco products.

3. Suspended Federal Regulations

The Food and Drug Administration, based on its interpretation of the Food, Drug and Cosmetic Act of 1938, recently promulgated regulations restricting cigarette advertising. These regulations are contained in Title 21 of the Code of Federal Regulations, Parts 801, 803, 804, 807, 820, and 897. These regulations would prohibit outdoor advertisements, including billboards and posters, within 1,000 feet of the perimeter of any public playground, park, elementary or secondary school, restrict tobacco advertisements to black and white, and prohibit the sponsoring of events in the name of a tobacco product. These regulations would also preempt state or local laws that are “different from, or in addition to,” the final rules, unless there is a compelling need, and an exemption is granted. 21 U.S.C. § 360k(a)(1).

The effect of these regulations was stayed, however, by Coyne Beahm, Inc. v. U.S. Food & Drug Admin., 966 F. Supp. 1374 (M.D.N.C. 1997). In that case, the District Court for the Middle District of North Carolina held that the FDA acted outside of its authority in enacting the regulations, and that the regulations pertaining to advertising were not authorized by the Food, Drug & Cosmetic Act. The FDA has appealed this ruling to the Fourth Circuit Court of Appeals. In the meantime, the regulations are not enforceable. Subsections 897.14(a) and (b), regulating sales to minors, remain in effect and are discussed below.

4. The Settlement Between the Tobacco Companies and the States' Attorneys General

The historic pending settlement between the tobacco industry and the state attorneys general (the Settlement) includes legislation that incorporates most of the federal regulations and goes beyond them to further restrict tobacco advertising. The Settlement would ban all outdoor tobacco product advertising, including in enclosed stadia, as well as brand advertising directed outside from a retail establishment. The Settlement would be enforceable by civil and criminal penalties through the FDA, and the FDA would have the authority to contract directly with state agencies to assist with enforcement.

The Settlement also includes language to preserve state and local government authority to take additional tobacco control measures that further restrict or eliminate the product's use by, and accessibility to, minors. Local governments would, however, be preempted from taking any other measures to regulate tobacco sales or advertising.

The terms of the Settlement were rejected by every major national health and anti-smoking organization. Recently, the Settlement was rejected by President Clinton and sent back to the table for further negotiations. Earlier this month, two bills were introduced relating to the Settlement. The first bill, introduced by largely southern senators, is based on the terms of the failed Settlement. A second bill, introduced by senators from Illinois, New Jersey and Massachusetts, responds to the concerns and demands of the public health community. Both of these bills are pending.

B. State Law

Currently, there are no California state laws directly related to the advertising of tobacco. The Stop Tobacco Access to Kids Enforcement Act (the STAKE Act), California Business & Professions Code §§ 29522 et seq., requires retailers to post signs stating that sales of tobacco products to minors are illegal, and that identification is required for those under 18, among other provisions. *Effective January 1998, the STAKE Act will prohibit tobacco billboards within 1000*

feet of any schools or playgrounds. Local governments are not preempted by the STAKE Act from imposing a more restrictive or complete ban on billboard advertising or tobacco-related advertising.

Violation of the STAKE Act can result in civil penalties from \$200 for the first violation up to \$6,000 for the fifth violation. The Act is to be enforced by the California State Department of Health Services; however, the Health Department can delegate enforcement to local law enforcement agencies through an agreement. Currently, the Health Department has no such agreements and enforces the STAKE Act by use of its own personnel in the San Diego area.

C. Local Ordinances

1. Baltimore: A Narrowly Tailored Ordinance

As discussed above, the Baltimore ordinance focuses on eliminating advertising from areas frequented by children (school zones, residential zones) while making important exceptions to balance the right to engage in commercial speech (commercial zones and vehicles, retail stores). In doing so, Baltimore made some large concessions to commercial speech. Billboards along interstate highways, likely to be seen and read by pre-teen and teenage passengers, were exempted. Stadium ads, seen by minors watching sporting events at the stadium and on television, were exempted. Notably, these concessions contributed to the survival of the ordinance. As the District Court stated:

This Court holds that the City's chosen means are narrowly tailored to advance the City's asserted interest of decreasing the exposure of minors to stimuli that would encourage them to purchase cigarettes, thereby decreasing the number of illegal transactions The City has limited the ban on cigarette advertising to billboards in neighborhoods in which children would typically be found In those residential and business zones in which children would not normally be found, the ordinance has no effect. [The ordinance] is also narrowly tailored in that it applies only to . . . billboards, which are particularly problematic in that they are easily accessible to children . . . while leaving other mediums . . . which do not cause these specific problems, unrestricted.

Penn Advertising, 862 F. Supp. 1402, 1414 (D.Md. 1994).

Another important concession made by Baltimore is the exemption of advertising contracts that existed before the effective date of the ordinance, that is, thirty days after its enactment. Burton Levin of the Baltimore City Attorney's Office, speaking at a forum on tobacco regulation on September 29, 1997, stated that this provision resulted in the renegotiation of contracts within the thirty-day window to extend their terms for years, thereby avoiding the effect of the ordinance. Nonetheless, Levin maintains that this approach was necessary to avoid constitutional takings claims.

Levin also pointed out that the lawsuit filed against Baltimore was a civil rights action brought under 42 U.S.C. § 1983. As such, if the City had lost, the City could have been responsible for paying the Plaintiff's attorneys fees, a sizable sum. This risk should be considered by any city enacting tobacco legislation.

2. Long Beach and Carpenteria: Ordinance by Consensus

The cities of Long Beach and Carpenteria, California, negotiated with billboard companies in their cities to agree upon ordinances restricting advertising and/or sales to minors. By using a consensus approach, both sides were able to benefit from the good publicity generated by the ordinance, and the cities avoided any legal challenges that may otherwise have been brought. For example, the Long Beach ordinance prohibits tobacco billboard advertising within 500 feet *or visible from* any school, hospital, place of worship, or recreational center. *Requiring* that a tobacco billboard not be visible from any of these many locations in a city, could be found overbroad by a court, but because the advertisers agreed to it, it will not be challenged in court. Carpenteria also worked with local merchants in drafting its access restrictions, and reports full compliance by merchants and retailers. Other cities, like Seattle, Washington, have negotiated binding agreements with billboard advertisers limiting advertising, instead of enacting ordinances.

3. San Francisco: A Long Haul

The city of San Francisco has been working on its ordinance for several years. Initially the Board of Supervisors took a broad approach and were met with substantial opposition. The Board then conducted public hearings on the issue. The current ordinance proposed by San Francisco is more focused, but still faces opposition.

II. THE PROPOSED E-TASK ORDINANCE

The purpose of the proposed E-TASK Ordinance is to reduce sales of tobacco to minors. In order to meet that goal, the E-TASK Ordinance proposes to restrict advertising, limit minors' access to tobacco, strengthen enforcement, require that tobacco retailers be licensed, and ban specialty tobacco stores near schools. The key element of the proposed ordinance is the banning of tobacco sales and advertising around schools to create a "no-tolerance zone" in those areas.

Although the growing consumption of tobacco by minors has been documented nationally, we do not have evidence that illegal sales of cigarettes to minors is a significant problem in San Diego. The most recent Tobacco Compliance Check conducted by the San Diego Police in April 1997 showed that of eighty attempted purchases by minors, only six purchases were made, a 92% compliance rate. The statewide average compliance rate is 71%.

Further, many retailers in San Diego have participated in the "We Card" program, receiving training seminars and materials to educate store clerks on the importance of requiring identification for tobacco sales. This program is funded without money from the City, and has reportedly been a successful tool in educating retailers.

A. Advertising Restrictions Under the E-TASK Ordinance

The E-TASK Ordinance would prohibit outdoor tobacco ads on billboards, sides of buildings, and free standing sign boards and fences, except for signs at retail stores, and on commercial vehicles. Signs in commercial zones are also excepted, as long as they are not within 1000 feet *or visible from* residential areas, schools, day care centers, libraries, parks, or playgrounds. The ordinance would also ban tobacco ads and promotional displays inside retail stores that are located within 1000 feet of schools, playgrounds, parks, day care centers, and libraries. No grace period or grandfather provision is given for existing advertising contracts.

Although the E-Task Ordinance is similar to the Baltimore ordinance, it is much broader in scope and provides fewer exceptions for commercial speech, making it vulnerable to attack in litigation. By banning promotional displays inside retail stores, the ordinance will not only affect the income of retailers who receive money for carrying the displays (creating an immediate base for opposition to the ordinance), but will also limit commercial speech designed to convey to the consumer the types of products available at the store. A restriction on ads on the outside of retail stores, or located below three feet, or ads located near candy or snack displays, for example, would more closely fit the legitimate goal of the ordinance.

This office is not aware of any research that has been conducted to show the frequency of tobacco advertising within 500 to 1000 feet of schools or other sites in the City of San Diego, or of advertising that is visible from such areas. Eighty-five percent of the billboards in San Diego

are controlled by Eller Media and Outdoor Systems. These two companies already operate under a *self-imposed tobacco advertising ban of 500 feet* around schools, churches, playgrounds and hospitals. However, by banning advertising that is “visible” within 1000 feet of residential areas, libraries, parks or playgrounds, it is anticipated that a significant number of businesses and signs will be affected. In many older San Diego neighborhoods, residential areas overlap with commercial areas as uses have changed over the years. The Normal Heights, North Park, and Kensington branch libraries, for example, are all located on commercial streets.

This office recommends that the City Council do the following before considering enacting the restrictions on advertising proposed by the E-TASK Ordinance:

1. Gather information from the communities of San Diego relating to the frequency of tobacco advertising around schools and other areas frequented by children.
2. Determine what areas of the City would be subject to the tobacco advertising ban and what areas would be available for such ads.
3. Investigate how many signs are within a commercial zone that is within 1000 feet or visible from any residential areas, schools, day care centers, libraries, parks, or playgrounds and therefore subject to the ordinance. Investigate how many signs would be affected by a 500-foot ban, a 1000-foot ban, or a line of sight ban, from these areas.
4. Determine the number of businesses that sell tobacco products that are within 1000 feet of schools, playgrounds, parks, day care centers and libraries. Identify the amount of income received from these businesses for tobacco displays.
5. Gather information from the communities of San Diego, as well as any national studies, concerning how tobacco advertising affects children. John Pierce, Ph.D., a professor at UCSD, has done research on this subject and expects to publish his research in the near future.
6. Explore less restrictive means of achieving the ordinance’s goal.

All of this information will assist the Council in forming a constitutionally-sound basis for an ordinance that meets the identified needs of San Diego.

B. Limiting Access of Minors to Tobacco Under the E-TASK Ordinance

The E-TASK Ordinance would require retailers to check the identification of anyone purchasing tobacco who appears to be under age 27, prohibit self-service sales and displays, prohibit distribution of free samples, prohibit out-of-package sales, and require that signs be posted stating the age requirement for buying cigarettes. Although these provisions are somewhat duplicative of existing state and federal law, enacting these restrictions on a local level allows for them to be enforced by local law enforcement.

1. Existing Law Relating to Access by Minors

Existing federal law, which became effective in February 1997, prohibits sales of tobacco to those younger than 18 years of age and requires that retailers check identification for those younger than 27 years of age. It also prohibits cigarette vending machines and requires that cigarettes must be sold in full packages. 21 C.F.R. § 897.14. Enforcement is by the Food and Drug Administration. Given that the regulations have only recently been put into effect, additional enforcement information is not available at this time. These regulations preempt any state or local laws that are “different from, or in addition to, the final rule.” 21 U.S.C. § 360k(a)(1). Accordingly, an ordinance that enacts the *same* provision on a local level would not be preempted. A more restrictive or “different” provision, would be preempted.

The Federal Regulations that were to take effect in August 1997 would have prohibited cigarette vending machines, free samples, and self-service displays unless in areas only accessible to adults. In addition, the regulations would have set the minimum package size at 20 cigarettes. 21 C.F.R. § 897.16. Because of the current litigation (Coyne Beahm, Inc. v. United States Food & Drug Administration), it is uncertain when or if these regulations will be effective. However, the tobacco Settlement would implement these Federal Regulations and expand the prohibitions. In addition to the Federal Regulations, the Settlement would ban distribution of tobacco products through the mail.

The California Penal Code provides that the sale of tobacco products to minors is a misdemeanor. It is punishable by fines from \$200 to \$1000 and up to six months in jail. Cal. Penal Code § 308. It is also illegal under state and local law for a minor to be in possession of tobacco. Cal. Penal Code § 308(b), San Diego Municipal Code § 58.04. It is also illegal under the Penal Code to sell single cigarettes. Cal. Penal Code § 308.2. A violation of this code section is an infraction and is punishable by a fine of up to \$250. These laws are enforceable by local law enforcement agencies.

Penal Code section 308 *may* preempt a local ordinance on the same subject matter. Section 308(e) states: “It is the Legislature’s intent to regulate the subject matter of this section. As a result, no city, county or city and county shall adopt any ordinance or regulation inconsistent

with this section.” In Bravo Vending v. City of Rancho Mirage, 16 Cal. App. 4th 383 (1993), the court interpreted this subsection to mean that the State intended to exclusively regulate the penal aspects of the sale of cigarettes to minors. Id. at 402. In that case, the City of Rancho Mirage created an ordinance requiring licenses for businesses selling cigarettes, and prohibiting the use of such licenses for sales through vending machines. In its analysis, the court thoroughly evaluated preemption by state law and explained that a local law conflicts with a state law if it duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication. Id. The court then found that in enacting Penal Code section 308(e), the Legislature expressly intended to occupy the regulatory field of the penal aspects of sales of cigarettes to minors. Although the court determined that the Rancho Mirage ordinance regulated the business of selling cigarettes in an attempt to make the sales of cigarettes to minors less likely, the court distinguished the ordinance as one designed to *discourage* a criminal act, and thus was not preempted by the statute *proscribing* the act. Id. at 409.

The STAKE Act requires the State Department of Health Services to establish a program to require retailers of tobacco products to post signs stating that sales of tobacco products to minors are illegal and that identification is required. Cal. Bus. & Prof Code § 29522. The STAKE Act requires retailers to check identification of anyone that attempts to purchase tobacco and reasonably appears to be under 18 years of age. Cal. Bus. & Prof. Code § 22594. The STAKE Act also restricts placement of cigarette vending machines. The STAKE Act provides for civil penalties beginning with \$200 for first time violations and up to \$6,000 for a fifth violation. The STAKE Act allows the State Department of Health to delegate enforcement to local law enforcement agencies and outlines the enforcement procedures to be used. Currently, Department of Health personnel enforce the STAKE Act on a periodic basis.² According to a representative of the Department of Health Services, approximately 95 violations were reported in the San Diego area in the last fiscal year.

Under California Health & Safety Code section 118950, it is unlawful to give free samples of smokeless tobacco or cigarettes on public property including parks and sidewalks unless it is a place where minors are prohibited. This section provides for civil penalties from \$200 to \$1,000.

2. The E-TASK Ordinance Proposals Relating to Access by Minors

a. Identification Checks. Requiring identification checks for persons under 27 is directly related to the goal of reducing sales to minors. This provision is included in section 897.14 of the

²The enforcement procedures contained in the STAKE Act are complicated and expensive to implement. Consequently, the San Diego Police Department prefers to enforce Penal Code section 308 and local laws.

Code of Federal Regulations, and is currently in effect. However, including this provision in a city ordinance would permit enforcement by local police.

b. Self-Service Displays. By prohibiting self-service sales and displays, the E-TASK Ordinance would require hand-to-hand sales from the clerk to the customer of all tobacco products, thereby decreasing the likelihood of sales to minors. Other cities' ordinances have excluded bulk or carton sales, items less likely to be purchased by minors. Retailers have objected to this prohibition because they receive some of their compensation from tobacco companies for allowing these displays in their stores. The American Lung Association indicated at the PS&NS meeting of October 29, however, that tobacco suppliers are now providing retailers with a plexiglass panel that fits over the self-service display to convert it to a non-self-service display. This should enable retailers to keep their displays in place, although we have not heard from retailers on this issue.

c. Out-of-Package Sales. Prohibiting out-of-package sales is also directed at minors on the premise that minors are more likely than anyone else to purchase a single cigarette. California Penal Code section 308.2, however, already prohibits the sale of single cigarettes to anyone. Since this section is enforceable by local police, there is no advantage in enacting this provision as part of the ordinance. Section 897.14 of the Code of Federal Regulations also requires that cigarettes be sold in full packages.

California Health & Safety Code section 118950 prohibits free samples of tobacco products. This provision is also enforceable by local police.

The California STAKE Act already requires retailers to post signs stating that sales of tobacco products to minors are illegal and that identification is required for those under 18. Retailers participating in the "We Card" program are also provided with eye-catching signs that state "Under 18--No Tobacco." The sign proposed by the E-TASK ordinance would use the same language as that of the STAKE Act. Thus, the City would not be adding a new requirement, but would be gaining local enforcement powers.

B. Enforcement of E-TASK Ordinance Restrictions

The E-TASK Ordinance proposes that the San Diego County Department of Health develop an education program to inform retailers of the new law. Including the Health Department potentially tags the ordinance as truly designed to meet a goal related to smoking and health. The ordinance proposes using the police department (including RSVPs and Code Enforcement) to enforce the ordinance.

Penalties already exist in the Penal Code for a minor found in possession of tobacco and for sale of tobacco to minors. Cal. Penal Code § 308. San Diego Municipal Code section 58.04 also prohibits possession of tobacco by a minor.

C. Licensing of Tobacco Retailers Under the E-TASK Ordinance

The E-TASK Ordinance would require retailers to obtain a license from the City in order to sell tobacco. According to the proposed ordinance, a fee would be charged in order to fund the licensing program, and “the license would be used to keep track of tobacco vendors.” A license could be suspended for failure to comply with the ordinance. This provision should be explored in more detail to determine how the licensing program would be administered, how information obtained from that program would be kept and used, what benefits would be obtained from the program that would not be available without the program, and what the anticipated costs would be to the City.

The City of Rancho Mirage has a licensing ordinance that was upheld in Bravo Vending v. City of Rancho Mirage, discussed above. The Rancho Mirage licensing program requires an annual fee of twenty-five dollars.

The tobacco Settlement proposes a licensing program that mandates compliance and creates penalties for violations including suspension and revocation. Enforcement under the Settlement is by federal, state, and local authorities through funding provided by the tobacco industry payments.

D. Limiting Specialty Stores Under the E-TASK Ordinance

“Specialty stores” are defined in the E-TASK Ordinance as stores where tobacco sales constitute over 51% of total sales. The ordinance proposes to ban such stores “near schools,” but grandfather in existing stores. This provision is aimed at limiting sales to minors, but may be overbroad in several respects. In considering this provision, the Council should consider the following:

1. How near is “near”?
2. Are there any specialty stores currently located within 1000 feet of a school? Are minors permitted in the store? Does the community report any problems related to the store?

3. How will the enforcing agency determine the percentage of tobacco sales for application of the ordinance? Is there a less intrusive way of defining "specialty store"?
4. Will variances be permitted? If so, when?

This office does not currently have any information regarding how many specialty stores exist in San Diego, where they exist, or whether there has been a problem with these stores selling tobacco to minors.

CONCLUSION

III. PRACTICAL APPLICATIONS FOR A SAN DIEGO ORDINANCE

Based upon the federal laws currently in effect, and the cases interpreting these laws, in order to avoid preemption, any ordinance created by the City of San Diego must be clearly directed toward the goal of preventing minors from engaging in the criminal activity of purchasing or possessing tobacco, and not based upon smoking and health concerns. Furthermore, any ordinance must only include action that will help it meet its stated goal. Broad regulations that go beyond what is needed to meet the stated goal will be construed as designed to meet some other goal, and may either be preempted by the FCLAA and/or may violate the First Amendment. In short, in order to be valid, any ordinance enacted by the City of San Diego, must do the following:

1. It must state a purpose and goal, supported by relevant data, such as preventing crime by minors, that is not related to smoking and health;
2. It must be narrowly tailored to meet its goal, that is, there must be a reasonable fit between the provisions of the ordinance and the goal sought to be obtained; and
3. It must not regulate the content of advertising, but should instead focus on placement of advertising or the manner of promotions.

Further, any ordinance should exclude existing contracts or include a grace period to avoid takings claims.

Businesses in San Diego have made concentrated efforts to reduce sales of tobacco to minors, and to limit advertising near schools. In order to form a constitutionally-sound basis for enacting further restrictions, additional facts should be gathered demonstrating the extent and

severity of the problem in San Diego. Thereafter, depending on what the facts show, an ordinance modeled after the proposed E-TASK Ordinance could be drafted.

CASEY GWINN, City Attorney

By

Carrie Gleeson
Deputy City Attorney

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Attachment

ML-97-30

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